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No. 08-640

IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HIS ROYAL HIGHNESS PRINCE TURKI AL-FAISAL BIN ABDULAZIZ AL-SAUD

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QUESTIONS PRESENTED*

1. Whether a high-ranking foreign official sued in U.S. courts for acts undertaken in an official capacity in furtherance of a foreign sovereign's national and foreign-policy objectives is entitled to sovereign immunity.

2. Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(5), to sue a high-ranking official of a foreign state on allegations that the official, acting in his official capacity, provided material support and resources for a terrorist act, when the U.S. government has *not* designated the foreign state as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* § 1605A.

3. Whether allegations that a foreign person donated money to a foreign charity allegedly knowing that the money would be diverted to al Qaeda represent conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction over the person.

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* This Brief in Opposition addresses only the first and third questions presented in the petition. For the reasons set forth in the Brief in Opposition of the Kingdom of Saudi Arabia and the Saudi High Commission, this Court's review is also not warranted on question two.

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INTRODUCTION

In these consolidated actions, His Royal Highness Prince Turki Al-Faisal bin Abdulaziz Al-Saud ("Prince Turki") stands accused of causing the terrorist attacks of September 11, 2001, through actions taken in his official capacity as Director of Saudi Arabia's Department of General Intelligence ("DGI"). Petitioners claim that, in that capacity, Prince Turki brokered an alleged deal with the Taliban not to seek the extradition of Osama bin Laden in exchange for bin Laden's agreement not to direct attacks at Saudi Arabia, and they further assert that Prince Turki provided unspecified support and resources to al Qaeda.

These allegations are fabricated. Uncontroverted evidence, including Prince Turki's sworn declaration and findings by the United States government, refute petitioners' claims and indeed make clear that Prince Turki has spent much of his career combating terrorism in general and al Qaeda in particular. Despite repeated invitations and opportunities – and despite settled law requiring plaintiffs seeking to vitiate a defendant's claim of sovereign immunity to come forward with evidence establishing jurisdiction – petitioners have failed to counter this evidence or otherwise to substantiate their allegations in any respect.

In the decision below, the Second Circuit became the third court to review petitioners' allegations against Prince Turki, and the third to conclude that petitioners' claims are legally insufficient and must be dismissed. The petition does nothing to call that decision into question or to suggest that further review by this Court would do anything other than unnecessarily delay the final dismissal of defamatory allegations that have now been pending against Prince Turki for six years.

The Second Circuit's conclusion that the Foreign Sovereign Immunities Act of 1976 ("FSIA") applies to individuals sued in an official capacity creates no conflict among the courts of appeals. Five (now six) federal courts of appeals and countless district courts have held that the FSIA applies to foreign officials sued for official-capacity acts. The decision of the Seventh Circuit on which petitioners rely does not present a conflict worthy of this Court's attention: that decision, which this Court refused to review despite the presence of the same supposed conflict petitioners identify here, appears to have rested on the ground that the acts in question were not undertaken in the defendant's official capacity and thus did not resolve the issue presented here. Even if it had, moreover, the Seventh Circuit's decision is subject to revisiting in light of recent amendments to the FSIA that, as the Second Circuit recognized below, confirm that the statute applies to individuals. Review is also unnecessary because the Second Circuit's decision is correct: the text, history, and purposes of the FSIA establish that the statute applies to foreign officials sued in an official capacity.[1] Finally, and in all events, this case is an unsuitable vehicle to address the issue: whether immunity for individuals rests in the FSIA, the common law, or both is irrelevant to the outcome. In this case – where petitioners seek to hold liable the head of the Department of General Intelligence of a U.S. ally for acts taken

[1] Indeed, notwithstanding their position in this Court, the *Federal Insurance* plaintiffs have long acknowledged that the FSIA governs claims against "Prince Turki" and others "to the extent" they are sued for "act[s] in their capacities as officials of the Kingdom." Brief of *Federal Insurance* Plaintiffs-Appellants at 1 n.1, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007).

in his official capacity – Prince Turki is entitled to sovereign immunity whatever its source.

With respect to the scant allegations against Prince Turki in his personal capacity (allegations made only by the *Federal Insurance* plaintiffs), review of the Second Circuit's holding that U.S. courts lack personal jurisdiction is equally unwarranted. Applying settled principles, the Second Circuit correctly concluded that petitioners failed to allege that Prince Turki aimed conduct at the United States or U.S. residents. Petitioners' disagreement with the court of appeals' application of settled legal principles provides no ground for this Court's review. Beyond that, there is no conflict among the courts of appeals on this issue, and this case would in any event be an exceptionally poor vehicle to resolve any such conflict: petitioners' conclusory allegations against Prince Turki fall short under any legal standard.

STATEMENT OF THE CASE

1. Petitioners' Allegations

The bulk of petitioners' allegations against Prince Turki involve conduct allegedly undertaken as head of "Saudi Arabia's general intelligence service, the Istakhbarat [or the DGI]." First Am. Compl. ¶ 445, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Mar. 10, 2004) ("Compl."). Petitioners generally maintain that, in that official capacity, Prince Turki "provided material support and resources to al Qaida" and that, under Prince Turki's direction, the DGI provided "financial aid and material support to the Taliban," which in turn was "supportive" of al Qaeda. *Id.* ¶¶ 446-447.

To support these generic claims, petitioners focus on alleged meetings between Prince Turki and Osama

bin Laden and the Taliban. Petitioners assert, for example, that "Prince Turki met personally with bin Laden at least five times while in Pakistan and Afghanistan during the mid-eighties to mid-nineties. Prince Turki also had meetings with the Taliban in 1998 and 1999." Third Am. Compl. ¶ 257, *Ashton v. al Qaeda*, Nos. 02CV6977 et al. (S.D.N.Y. filed Sept. 5, 2003). Petitioners claim that Prince Turki first met bin Laden at the Royal Embassy of Saudi Arabia in Islamabad, Pakistan, during the Soviet Union's occupation of Afghanistan in the 1980s. *See id.* ¶ 254. Petitioners allege that, around the time Iraq invaded Kuwait in 1990, bin Laden offered Prince Turki and His Royal Highness Prince Sultan bin Abdulaziz Al-Saud ("Prince Sultan"), then and now the Minister of Defense of Saudi Arabia, "engineering equipment available from his family's construction company," and that bin Laden also "suggested bolstering Saudi forces with Saudi militants who [he] was willing to recruit." *Id.* ¶¶ 253-254. Petitioners broadly assert, apparently based on these supposed interactions, that Prince Turki had an "ongoing relationship" with bin Laden and that he used that relationship to help arrange a meeting between Iraq's Ambassador to Turkey and bin Laden in 1998. *Id.* ¶¶ 254, 262.

Petitioners also claim that Prince Turki attended a meeting in July 1998 at which he is alleged to have promised oil and financial assistance to the Taliban (though not to al Qaeda). *See id.* ¶ 261. Petitioners allege that, "[a]fter the meeting, 400 new pick-up trucks arrived in Kandahar for the Taliban, still bearing Dubai license plates." *Id.* Petitioners also allege that, as part of an agreement supposedly reached at that meeting, "the Saudis would make

sure that no demands . . . for the extradition of terrorist individuals [were made], such as [for Osama] bin Laden, nor permit the closure of terrorist facilities and camps." *Id.*

Finally, with respect to personal-capacity allegations, the *Federal Insurance* complaint – alone among the nine complaints consolidated below – alleges that Prince Turki "made significant personal contributions to Saudi-based charities that he knew to be sponsors of al Qaida's global operations." Compl. ¶ 451. The *Federal Insurance* petitioners added this personal-capacity allegation only after their official-capacity claims were dismissed by the United States District Court for the District of Columbia. *See infra* pp. 8-9.

2. Prince Turki's Declaration and Petitioners' Failure To Come Forward with Evidence Supporting Their Allegations

a. Prince Turki moved to dismiss on the basis of sovereign immunity. In support of that claim – and consistent with established law providing that courts faced with a threshold claim of sovereign immunity may look behind the pleadings to assess the veracity of plaintiffs' allegations, *see, e.g., Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) – Prince Turki submitted a sworn declaration directly rebutting petitioners' claims. *See* Decl. of HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 02CV01616 (D.D.C. filed May 2, 2003) ("Decl."). In that declaration, Prince Turki expressly and unequivocally denied that he "encouraged, funded, or provided any form of material or other assistance – direct or indirect – to

enable Osama bin Laden and his Al-Qaeda network of terrorists to perpetrate the[] attacks" of September 11, 2001. *Id.* ¶ 4. Prince Turki's statement is corroborated by the findings of the congressionally chartered National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"), which, after an exhaustive study, found that: "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (the "9/11 Report").[2]

Prince Turki's declaration also establishes that all of his alleged acts would have been in an official capacity. Prince Turki served as Director of the DGI from September 1977 until August 2001. *See* Decl. ¶ 5. The DGI carries out functions similar in many respects to those of the U.S. Central Intelligence Agency ("CIA"), including collecting and analyzing foreign intelligence and carrying out foreign operations. *See id.* The activities of the DGI are an integral part of Saudi Arabia's foreign relations and national-security apparatus. *See id.* Among his other duties as head of the DGI, Prince Turki was actively involved in Saudi Arabia's efforts to combat international terrorism generally and the threat posed by Osama bin Laden and al Qaeda in particu-

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[2] The petition (at 4) quotes the first portion of the sentence excerpted in the text, as if to suggest that Saudi Arabia played a role in funding al Qaeda, while omitting the portion of the sentence in which the 9/11 Commission notes the absence of any evidence implicating the Saudi government or its officials in such funding.

lar. In so doing, he shared information and cooperated closely with other intelligence agencies, including the CIA. *See id.* ¶¶ 6, 10.

Prince Turki's declaration also establishes that, contrary to petitioners' unsupported allegations, Prince Turki's trips to Afghanistan in 1998 were for the purpose of conveying the official Saudi request that bin Laden be extradited to Saudi Arabia for trial. *See id.* ¶ 11. After Taliban leader Mullah Omar refused, Prince Turki recommended that Saudi Arabia withdraw its representative from Kabul and suspend diplomatic relations with the Taliban, which Saudi Arabia did in September 1998. *See id.* ¶ 13. In addition, Prince Turki's declaration refutes petitioners' naked allegations that, during these meetings in Afghanistan, Prince Turki reached an agreement with bin Laden or otherwise supported al Qaeda. *See id.* ¶¶ 15-16.

On these points as well, Prince Turki's declaration is confirmed by the 9/11 Report, which found that, after Saudi Arabia had disrupted an al Qaeda plot to attack U.S. forces in 1998, then-CIA Director George Tenet asked for the assistance of Saudi Arabia in capturing Osama bin Laden. *See* 9/11 Report at 115. In response, Saudi officials promised "an all-out secret effort to persuade the Taliban to expel Bin Ladin so that he could be sent to the United States or to another country for trial." *Id.* Prince Turki, as the Saudi "intelligence chief," was chosen as the "Kingdom's emissary" for that effort. *Id.* The 9/11 Report further documents that Prince Turki, "employing a mixture of possible incentives and threats, . . . received a commitment [from the Taliban] that Bin Ladin would be expelled, but Mullah Omar did not make good on this promise." *Id.*

Despite repeated invitations and opportunities to do so – and despite settled law that plaintiffs cannot merely rest on their allegations when sovereign immunity is at stake, *see, e.g.*, *Phoenix Consulting*, 216 F.3d at 40; *supra* p. 5 – at no point in the now six-year history of this litigation did petitioners submit any evidence contradicting Prince Turki's declaration or the corroborative findings of the 9/11 Commission.

b. Nor have petitioners ever provided specific allegations (much less evidence) to support their belated, conclusory claim that Prince Turki, in his personal capacity, made donations to charities that in turn provided material support and resources to al Qaeda. As noted, the *Federal Insurance* plaintiffs added that allegation only after their official-capacity claims against Prince Turki were dismissed. In view of Prince Turki's sworn denial and the fact that plaintiffs' allegations appeared to have been added without individual investigation, counsel for Prince Turki sent a letter to the *Federal Insurance* plaintiffs, invoking Federal Rule of Civil Procedure 11 and asking them to withdraw their allegations or to set forth a good-faith basis for them. The *Federal Insurance* plaintiffs never responded, much less have they set forth any basis for alleging that Prince Turki made donations to the charities named in the complaint.

3. District Court Proceedings

a. Prior to consolidation of these cases by the Judicial Panel on Multidistrict Litigation ("JPML"), the United States District Court for the District of Columbia dismissed official-capacity claims against Prince Turki. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 23 (D.D.C. 2003).

The *Burnett* court first held, consistent with five (now six) courts of appeals and countless district

courts, that foreign government officials are entitled to sovereign immunity under the FSIA. *See id.* at 14. The court further held that petitioners had alleged conduct that would have been taken in Prince Turki's "official capacity," and thus that he is presumptively entitled to immunity under the FSIA. *See id.* at 15. The court concluded that the noncommercial torts exception to immunity in 28 U.S.C. § 1605(a)(5) does not divest Prince Turki of that immunity for two principal reasons. First, petitioners' conclusory and attenuated allegations that Prince Turki caused terrorist attacks "would stretch the causation requirement of the noncommercial tort exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to terra incognita." *Id.* at 20 (citation omitted). Second, it is "nearly self-evident" that the conduct Prince Turki was alleged to have undertaken – in brokering a supposed "peace deal" with the Taliban, for example – is grounded in "'social, economic, and political policy'" and is therefore entitled to discretionary-function immunity under § 1605(a)(5)(A). *Id.* at 20-21 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

b. By order of the JPML, the *Burnett* case was subsequently transferred to, and consolidated with other cases in, the United States District Court for the Southern District of New York. That court, reviewing the decision in *Burnett* "de novo," Pet. App. 119a-120a n.2, reached the same bottom-line conclusions: the FSIA applies to foreign officials and requires the dismissal of all official-capacity claims against Prince Turki.

Consistent with the *Burnett* district court and the overwhelming weight of authority, the court first

held that immunity under the FSIA is "available to . . . Prince Turki, as the Director of Saudi Arabia's [DGI], to the extent [his] alleged actions were performed in [his] official capacit[y]." *Id.* at 136a. The court reasoned that a suit against a foreign official for official-capacity acts "is the practical equivalent of a suit against the sovereign directly." *Id.* at 135a (internal quotation marks omitted).

Turning to the FSIA's exceptions to immunity, the court first held, as relevant here, that the terrorism exception, 28 U.S.C. § 1605(a)(7) (repealed 2008), is not applicable because "[t]he parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism." Pet. App. 147a. The court further held that petitioners' claims do not fit within the noncommercial torts exception to immunity, for the same reasons the *Burnett* court had identified. First, petitioners had failed to "plead[] facts to support an inference that [Prince Turki] [was] sufficiently close to the terrorists' illegal activities to satisfy" traditional standards for tort liability. *Id.* at 161a. Allegations that Prince Turki knowingly and intentionally supported al Qaeda are "conclus[ory]" and therefore insufficient to bring petitioners' claims within § 1605(a)(5). *Id.* at 162a. Second, the alleged conduct of Prince Turki plainly involves "judgments based on considerations of public policy" and thus are excluded by the discretionary-function immunity codified in § 1605(a)(5)(A). *Id.* at 164a.

Because the *Federal Insurance* plaintiffs had by this point added their allegation that Prince Turki donated money to charities in a personal capacity, the court also addressed whether it had personal jurisdiction over Prince Turki. After canvassing this Court's personal-jurisdiction precedents, the court

determined that petitioners had not alleged "specific facts" establishing "Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda," and thus that the court could not exercise personal jurisdiction over Prince Turki. *Id.* at 188a.

4. The Second Circuit's Decision

The Second Circuit unanimously affirmed. Two aspects of the decision are relevant here.

a. First, the Second Circuit "join[ed] [its] sister circuits in holding that an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the FSIA." Pet. App. 14a. The court noted that, apart from being consistent with decades of district court decisions, five other courts of appeals had reached this conclusion. *See id.* at 14a-15a.

Beginning with the text of the FSIA, the Second Circuit observed that the terms "agency or instrumentality," as used to define a "foreign state" subject to protection under the FSIA, "do not in their typical legal usage necessarily exclude individuals." *Id.* at 18a (internal quotation marks omitted). The court reasoned that "[t]he term 'agency' has a more abstract common meaning than a governmental bureau or office: an agency," the Second Circuit said, "is any thing or person through which action is accomplished." *Id.* at 19a-20a.

That understanding of "agency or instrumentality," the Second Circuit reasoned, "is consistent with the evident principle that the state cannot act except through individuals." *Id.* at 20a. The court noted that several analogous areas of law support the conclusion that the extension of sovereign immunity to

foreign states is naturally understood to encompass official-capacity acts: the act-of-state doctrine, for example, has long encompassed "acts committed by individual officials of foreign governments." *Id.* The court deemed the reasoning behind that principle relevant here: "'the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.'" *Id.* (quoting *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897)). The court also pointed to principles of domestic sovereign immunity, under which it has long been settled that "'official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* (quoting *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

The Second Circuit drew additional support for its interpretation from the history of sovereign immunity and the purposes motivating enactment of the FSIA. In 1952, the U.S. Department of State issued the "Tate Letter," under which immunity applied to "the foreign sovereign's public acts," but it did "not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 15a (internal quotation marks omitted). Under that system of immunity, the State Department made binding suggestions of immunity. *See id.* at 15a-16a. As the Second Circuit explained, however, "by the 1970s, some in Congress had grown concerned that the Tate Letter system was leaving immunity decisions subject to diplomatic pressures rather than to the rule of law." *Id.* at 16a (internal quotation marks omitted). The FSIA, the court said, "largely codified the existing common law of sovereign immunity, with the notable exception

that it removed the role of the State Department in determining immunity." *Id.* (alterations and internal quotation marks omitted). Reading the FSIA as inapplicable to individuals (and leaving immunity determinations governed only by the common law), the court held, would "presumably" require courts "to give conclusive weight" to State Department suggestions of immunity, in conflict with "Congress's stated intent of removing the discretionary role of the State Department." *Id.* at 19a (internal quotation marks omitted).

Finally, the Second Circuit held that its "conclusion finds reinforcement in the new iteration of the [t]errorism [e]xception [to the FSIA], which makes special reference to the legal status of 'an official, employee or agent' of the foreign state." *Id.* at 21a (quoting 28 U.S.C. § 1605A(a)(1)). That provision, the court said, "evince[s] congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA." *Id.* The FSIA amendment thus confirms that "Congress has long contemplated the FSIA's application to individuals." *Id.* at 22a.

Because the FSIA applies to all official-capacity claims against Prince Turki – and because, as discussed in more detail in the Brief in Opposition of the Kingdom of Saudi Arabia, no exception to FSIA immunity is applicable – the Second Circuit affirmed the dismissal of all official-capacity claims against Prince Turki. *See id.* at 26a-39a.

b. The Second Circuit also affirmed the dismissal of claims based on the allegation that Prince Turki, in his personal capacity, donated money to charities that in turn supported al Qaeda.

Quoting directly from precedent of this Court, the Second Circuit held that personal jurisdiction would be proper over Prince Turki and other defendants (collectively referred to as the "Four Princes" by the court) if the defendants were alleged to have "'purposefully directed' [their] activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." Pet. App. 40a (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)). Under that standard, the court explained, "[m]ere foreseeability of harm in the forum state is insufficient." *Id.* at 40a-41a.

Applying those established rules, the Second Circuit held that petitioners' failure to allege that the Four Princes "expressly aimed" any conduct at the United States or U.S. residents precludes the exercise of personal jurisdiction. *Id.* at 43a (internal quotation marks omitted). After carefully reviewing all allegations, the court found that petitioners did "not allege that the Four Princes directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a. Instead, petitioners "rely on a causal chain" in which the Four Princes supposedly "supported Muslim charities knowing that their money would be diverted to al Qaeda." *Id.* at 42a-43a. Allegations that Prince Turki and others "[p]rovid[ed] indirect funding" to al Qaeda are, standing alone, insufficient to "constitute . . . intentional conduct" expressly aimed at the United States. *Id.* at 44a.

REASONS FOR DENYING THE PETITION

The Second Circuit's holding that the FSIA applies to foreign officials sued in an official capacity is supported by the overwhelming weight of authority. It does not, as petitioners argue, deepen an intractable conflict among the circuits. Nor do the views expressed by the United States in other cases warrant this Court's review: the position of the United States is that foreign government officials such as Prince Turki are entitled to *broader* immunity than that provided by the FSIA. Application of that broader immunity would necessarily yield the same result in this case. Indeed, the position of the United States establishes that this case is an inappropriate vehicle: Because Prince Turki is entitled to sovereign immunity regardless of its source, the question whether that immunity flows from the FSIA or the common law is irrelevant to the ultimate outcome of the case.

The Second Circuit's personal-jurisdiction holding likewise does not merit review. The court's core holding – that allegations that a foreign citizen donated money to foreign charities that then funneled money to al Qaeda does not establish jurisdiction in a U.S. court – hews closely to this Court's precedent. Nor does the court's fact-specific decision generate any conflict among the courts of appeals. Finally, petitioners' exaggerated claim that this decision undermines all terrorism-related litigation is unfounded.

I. CERTIORARI IS NOT WARRANTED ON QUESTION ONE

A. The Overwhelming View of Courts of Appeals Is That the FSIA Extends Immunity to Individuals Sued in an Official Capacity

1. Petitioners correctly acknowledge (at 14) that the Second Circuit joined "the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits" in holding that the FSIA extends immunity to foreign officials sued for acts taken in an official capacity. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996). Petitioners are wrong, however, in asserting (at 20) that there is a "square conflict" among the courts of appeals that warrants this Court's attention.

In support of this purported conflict, petitioners rely primarily on the Seventh Circuit's decision in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006). But it is far from clear that *Enahoro* creates a genuine conflict. There, Nigerian citizens sought to use the FSIA to establish jurisdiction, in an Illinois district court, over a Nigerian general, whom the plaintiffs accused of acts of torture and killing in Nigeria. *See id.* at 879. The Seventh Circuit held that the FSIA did not apply to – and thus that the court lacked jurisdiction over – the defendant under the FSIA. *See id.* at 882-83. In so holding, the court did observe, as petitioners emphasize, that the FSIA's definition of foreign state "does not explicitly include individuals" and that, had

Congress intended to include individuals, "it would have done so in clear and unmistakable terms." *Id.* at 881-82. That language, however, appears to be dicta. The court appears to have decided the case on the narrower ground that, even if the FSIA applies to official-capacity acts, the conduct alleged did not satisfy that standard. The court emphasized, for example, that the "issue [of whether the FSIA applies to individuals] is a long way from being settled," stressing that "[t]he FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in [his] official capacity." *Id.* at 882. Furthermore, the court relied heavily on the Ninth Circuit's decision in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), which the Seventh Circuit described as "similar to the one before [it]." 408 F.3d at 882. According to the Seventh Circuit, the Ninth Circuit in *In re Marcos* found the FSIA inapplicable *not* because the FSIA did not apply to individuals, but because the alleged acts were not official-capacity acts. *See id.* (describing the Ninth Circuit's decision as holding that defendant was "not entitled to immunity" because "she acted on her own authority and not on the authority of the [Philippines]").

Indeed, in opposing certiorari, the plaintiffs in *Enahoro* advanced that exact reading of the opinion. Although the defendant argued that the Seventh Circuit's decision divided the circuits on the applicability of the FSIA to individuals, the plaintiffs argued that there was no conflict because "a growing number of court decisions," like the Seventh Circuit's, have denied "FSIA immunity" to acts that are "unauthorized in nature, and outside the scope of an official's authority." Brief in Opposition at 12, *Abubakar v.*

Enahoro, 546 U.S. 1175 (2006) (No. 05-788), 2006 WL 189811; *see id.* at 6. This Court denied certiorari notwithstanding the fact that, if the reading of *Enahoro* advanced by petitioners here were correct, the Seventh Circuit created a conflict among multiple courts of appeals, because the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits had all squarely addressed this issue by the time of *Enahoro*.

Because the outcome of *Enahoro* appears to have turned on the rationale that any immunity available under the FSIA extends only to official-capacity acts, the language in the decision regarding applicability of the FSIA to individuals is not binding, and the Seventh Circuit's decision does not conflict with the Second Circuit's decision here. The relevant allegations against Prince Turki pertain to alleged acts taken in his official capacity, and the Second Circuit was clear that individual immunity is so limited. *See* Pet. App. 22a. For those reasons, unless and until the Seventh Circuit clarifies the import of *Enahoro*, there is no conflict among the courts of appeals that warrants this Court's attention.

Moreover, even if petitioners' reading of *Enahoro* were correct, certiorari would be unwarranted. In light of important statutory changes to the FSIA, any remaining disagreement on this issue may well be resolved absent this Court's intervention. Earlier this year, and subsequent to the Seventh Circuit's decision in *Enahoro*, Congress amended the terrorism exception in the FSIA. *See* 28 U.S.C. § 1605A(a)(1). As the Second Circuit explained, Congress's amendment "reinforce[s]" the conclusion that the FSIA applies to individuals: the terrorism exception's reference to "'an official, employee or agent' of a foreign state" "evince[s] congressional recognition that claims

against individual officials of a foreign government must be brought within the confines of the FSIA." Pet. App. 21a.

In the wake of that amendment – which sheds light on the proper interpretation of the FSIA as a whole, *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) – as well as substantial uncertainty regarding the scope of *Enahoro*, the Seventh Circuit will be free to reconsider the application of the FSIA to individuals in future cases. *See, e.g., Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977) ("intervening factor[s]" may justify "one panel" reconsidering "the precedents set by another panel"). Furthermore, because the Seventh Circuit's decision – even read broadly – has been overtaken by subsequent legal developments, it does not represent a conflict with other courts of appeals that should concern this Court. *See* Robert L. Stern et al., *Supreme Court Practice* 230 (8th ed. 2002) ("[a] conflict with a decision that has been discredited" by intervening legal changes "will not be an adequate basis for granting certiorari"). Indeed, because Congress's amendment of the FSIA is of recent vintage and because no court of appeals other than the Second Circuit has considered how that amendment bears on the issue of applicability of the FSIA to individuals, review by this Court now would be premature, foreclosing further ventilation of this issue in the lower courts.

2. Petitioners also argue (at 19) that the Second Circuit's decision "do[es] not recognize any continuing role for common law immunity and thus run[s] squarely against decisions of other circuits recogniz-

ing that common law immunity for heads of state, consular officers, and other government leaders survived the FSIA's passage." Petitioners are wrong.

Head-of-state, consular, and diplomatic immunity are specialized forms of immunity that serve different ends and offer distinct protections from the basic immunity afforded by the common law for official-capacity acts. *See* Restatement (Second) of Foreign Relations Law of the United States § 66 cmt. b (1965). For example, those special forms of immunity attach to both official *and* personal acts (even criminal conduct) but they apply *only* during the time an individual serves as a head of state or diplomat. *See, e.g.*, *Arcaya v. Paez*, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956) (diplomatic immunity applies to all judicial process but ends when diplomatic status ends), *aff'd*, 244 F.2d 958 (2d Cir. 1957); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (head-of-state immunity encompasses criminal prosecution of sitting heads of state).

That two circuits have recognized that these distinctive immunities remain viable after the enactment of the FSIA does not conflict with the position that the FSIA provides a baseline of immunity for official-capacity acts. Indeed, the Second Circuit did not, as petitioners wrongly contend, refuse to "recognize any continuing role" for common-law immunity; it held only that, because the protections of the FSIA required dismissal of official-capacity claims, it did not "*need [to] consider* any continuing vitality of sovereign immunity under the common law." Pet. App. 18a (emphasis added).[3]

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[3] Petitioners pressed this claim at oral argument before the Second Circuit to no avail. *See* Tr. 26:2-6 (Jan. 18, 2008) ("[I]t's

B. The Position of the United States Does Not Warrant This Court's Review

Petitioners also claim that review is warranted on the basis of a legal position set forth by the United States in other litigation. The United States, petitioners say (at 17), "has consistently urged" that the FSIA "does *not* extend to foreign officials acting in their official capacity." The position of the United States – to which courts owe no "special deference" in interpreting the FSIA, *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) – provides no basis for certiorari here.

First, although the petition itself neglects to mention it, the United States has pressed this issue in other cases because, in its view, sovereign immunity for foreign officials is *absolute* (and thus not subject to the exceptions recognized by the FSIA). "[T]he immunity . . . recognized" for officials under the common law, the United States has said, "did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be." Pet. App. 275a; *id.* at 265a (common-law immunity is absolute "and thus broader than the immunity of the state itself" under the FSIA). The upshot of this issue for the United States, then, is that foreign officials should be entirely immune from suit, not that petitioners should be able to proceed with their claims. *See id.* at 249a ("an official should be shielded

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pretty clear that Ambassadors and others who are resident abroad might need some additional or different protection, particularly with respect to what they do in their personal capacities.") (Jacobs, C.J.); *id.* at 26:15-18 ("An immunity that would provide a lesser coverage is not inconsistent with an immunity that would provide a greater coverage, is it?") (Vitaliano, J.).

from personal liability for the performance of official functions"); *id.* at 260a, 274a n.13. Accordingly, because the Second Circuit *dismissed* all claims against Prince Turki, this case does not implicate any concern identified by the United States. *See id.* at 259a ("refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials"). It is petitioners' position – that individuals acting in an official capacity lack immunity – that is most deeply contrary to the interests of the United States.

Indeed, the United States has expressly endorsed the key rationale of the "numerous circuit courts [that] have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts." *Id.* at 270a. Although the United States is of the view that immunity for officials resides in the common law rather than the FSIA, the United States has acknowledged that the Ninth Circuit and other courts have "cogently identified" "the rationale for" immunity, *id.* at 272a – namely, "that 'a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly,'" *id.* at 271a (quoting *Chuidian*, 912 F.2d at 1101); *see id.* (courts have "rightly" recognized that, "unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA"). As explained below, Prince Turki's alleged conduct was in an official capacity; whether the FSIA or the common law is the source of immunity thus makes no difference to the outcome of this case. *See infra* pp. 25-27.

Second, setting aside that the concerns of the United States are not implicated here, the United States' views do not warrant certiorari. Despite having advanced its position on the applicability of the FSIA to individuals since 1988, no federal court has ever embraced it. *See Chuidian*, 912 F.2d at 1101-03; *Matar v. Dichter*, 500 F. Supp. 2d 284, 289 n.2 (S.D.N.Y. 2007). Indeed, the United States acquiesced in the Ninth Circuit's judgment in *Chuidian* – no party sought this Court's review – and the United States did not file another statement of interest on this question for nearly two decades following *Chuidian*. *See* Pet. App. 272a n.11. During those intervening years, courts regularly applied the FSIA to foreign officials, and there is no evidence of any resulting disruption to U.S. foreign-policy interests.

C. The Decision Below Is Correct

This Court's review is also unwarranted because the decision of the Second Circuit is correct.

As the courts of appeals have now overwhelmingly recognized, the text of the FSIA is naturally read to apply to foreign officials (such as Prince Turki) acting in an official capacity. The FSIA commands that "a foreign state shall be immune from the jurisdiction" of U.S. courts, 28 U.S.C. § 1604; a foreign state is defined to "include[] . . . an agency or instrumentality of a foreign state," *id.* § 1603. As multiple courts have held, consistent with the Second Circuit here, the term "agency or instrumentality" is broad enough to include officials acting in an official capacity. *See* Pet. App. 19a; *Chuidian*, 912 F.2d at 1101; *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) ("[T]he FSIA is not written so narrowly as to exclude all but foreign states in name. It applies to foreign states, their political subdivisions, and their agencies and

instrumentalities. An individual can qualify as an agency or instrumentality of a foreign state.") (citation, alteration, and internal quotation marks omitted). Petitioners do not dispute that textual analysis.

That understanding of the FSIA is strengthened by the fact that an official-capacity suit is, in all practical effects, a suit against the state itself. It has long been established, in the sovereign-immunity context and elsewhere, that "the acts of the official representatives of the state *are those of the state itself*, when exercised within the scope of their delegated powers." *Underhill*, 65 F. at 579 (emphasis added). It follows that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state" for purposes of the FSIA. *Velasco*, 370 F.3d at 399. There is no evidence in the text or legislative history that Congress intended to depart from these principles in enacting the FSIA.

It is no answer to say that the common law was intended to be the exclusive source of immunity for individuals. That interpretation would render the FSIA largely futile. Were foreign officials unprotected by the FSIA, a plaintiff could merely alter the caption of a complaint against a foreign state and name foreign officials of the state as defendants instead. That would "vitiate[]" the comprehensive regime established by the FSIA by allowing parties to "recast[] the form of their pleadings," *Chuidian*, 912 F.2d at 1102, to avoid implicating the strictures of the FSIA. As this Court has explained, the FSIA is a "comprehensive statute" designed to "remedy" the "problem[]" that immunity decisions had rested with "two different branches" and were subject to a "variety of factors, . . . including diplomatic considerations." *Altmann*, 541 U.S. at 691 (internal quota-

tion marks omitted). The view that individual immunity is subject to the common law and outside the scope of the FSIA would countermand Congress's aim of creating a comprehensive system of immunity based on legal judgments rather than political calculations. *See* Pet. App. 19a.

D. Resolution of This Issue Is Irrelevant to the Outcome of the Case

Finally, for related reasons, this Court's review is unwarranted because, even if the FSIA does not apply to individuals, the claims against Prince Turki must still be dismissed.

As noted above, if Prince Turki is not entitled to immunity under the FSIA, he is entitled to the absolute immunity afforded by the common law. Prior to the enactment of the FSIA, common-law immunity attached to claims against foreign officials for acts taken in their official capacity. *See* Restatement (Second) of Foreign Relations Law of the United States § 66. Under the common law, provided an act was taken in an official capacity, it was treated as the act of the state for immunity purposes. *See, e.g.*, *Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977* (M. Sandler, D. Vagts & B. Ristau, eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1037 (quoting suggestion of immunity: "acts done by Mr. Thomson in the course of, or in connection with, his official duties . . . constitute sovereign or public acts . . . of the Government of Canada, and for such acts the Dominion of Canada is entitled to enjoy sovereign immunity in courts in the United States"); *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971). And, as the United States has said, when that immunity attaches, it is absolute. *See supra* p. 21.

Prince Turki qualifies for immunity under that standard. Petitioners acknowledge that their "lawsuit . . . seeks to impose liability for injuries that [Prince] Turki inflicted while acting within the scope of his employment" as head of DGI. Reply Brief of the *Burnett* Plaintiffs-Appellants at 10 n.4, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007). And Prince Turki has averred – and petitioners have not challenged – that any dealings with Osama bin Laden and/or the Taliban were in his official capacity in carrying out the foreign and national-security policy of Saudi Arabia. *See* Decl. ¶ 5. Because official-capacity claims against Prince Turki must be dismissed whether his immunity lies in the FSIA or the common law, the source of his immunity is academic to the outcome of the case.[4]

Whether the FSIA applies to individuals is irrelevant here for a second reason: even if the FSIA did not apply to individuals, and even assuming that petitioners could somehow evade the absolute bar of common-law immunity, petitioners would still be required to establish the Court's personal jurisdiction

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[4] Prince Turki sought dismissal on grounds of both FSIA and common-law immunity. *See* Prince Turki's Mem. in Support of Mot. To Dismiss Compl. by Federal Insurance Plaintiffs at 2 n.4, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed May 10, 2004); Prince Turki's Mot. To Dismiss at 17-18, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 02CV01616 (D.D.C. filed May 5, 2003). And, contrary to petitioners' suggestion (at 19 n.7), the State Department need not make any suggestion of immunity to confer sovereign immunity under the common law; such immunity applies automatically. *See* U.S. Statement of Interest at 8, *Matar v. Dichter*, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983).

over Prince Turki. But, as the Second Circuit rightly concluded, petitioners cannot do so consistent with well-established constitutional principles. *See* Part II, *infra*.

II. CERTIORARI IS NOT WARRANTED ON QUESTION THREE

A. The Second Circuit Correctly Applied Settled Principles of Personal Jurisdiction and Created No Conflict in Doing So

1. As to petitioners' personal-capacity allegations, the Second Circuit – applying this Court's decisions in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Calder v. Jones*, 465 U.S. 783 (1984), and *Burger King*, *supra* – held that allegations that the Four Princes donated money to charities that in turn diverted funds to al Qaeda do not constitute conduct "'expressly aimed'" at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction. Pet. App. 43a (quoting *Calder*, 465 U.S. at 789). Petitioners have not alleged, the court found, "that the Four Princes directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a. And the allegations that petitioners have made that foreign persons donated money to foreign charities – are insufficient to "establish that the Four Princes 'expressly aimed' intentional tortious acts at residents of the United States." *Id.* at 44a (quoting *Calder*, 465 U.S. at 789).

That holding is correct. Even if it were true (and it is not) that Prince Turki, at some unspecified point in time, made personal donations to foreign charities that in turn made payments to al Qaeda, it would not follow that Prince Turki expressly aimed any conduct toward the United States. Just as "[t]he placement

of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (plurality op.), so, too, an alleged contribution (in an unspecified way, at an unspecified time) to a foreign charity that allegedly used the contributions to fund global terrorism is not purposefully directed toward the United States, *see Burger King*, 471 U.S. at 474 ("foreseeability" of injury in forum "is not a sufficient benchmark for exercising personal jurisdiction") (internal quotation marks omitted); *World-Wide Volkswagen*, 444 U.S. at 295.

2. Petitioners maintain that the Second Circuit's holding conflicts with this Court's precedent. They acknowledge that mere "foresee[ability]" of injury in a forum is not sufficient for a court to exercise personal jurisdiction, but, they argue, petitioners allege that the Four Princes "*knowingly* funneled money to al Qaeda *knowing* al Qaeda intended to use those funds to attack U.S. civilians in the United States." Pet. 27. That mischaracterizes the allegations: with respect to Prince Turki, for example, petitioners allege only that Prince Turki made "personal contributions to Saudi-based charities that he knew to be sponsors of al Qaida's global operations" and that he "knew and intended that the contributions . . . would be used to fund al Qaida's global operations." Compl. ¶¶ 451, 452. Even taking such frivolous, conclusory allegations as true, they are insufficient to support personal jurisdiction because they do not aver that Prince Turki expressly aimed conduct *at the United States*, let alone that he intended his donations to be used "to attack U.S. civilians." *See Calder*, 465 U.S. at 790 (personal jurisdiction is proper where defen-

dants are "primary participants in an alleged wrongdoing intentionally directed" at forum).

3. Petitioners incorrectly assert (at 28) that this holding "conflicts with decisions of the Seventh, Ninth, and D.C. Circuits." In *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997), the Seventh Circuit held that allegations that a California company intentionally "threaten[ed]" an Illinois company's "customers" – which caused the Illinois company to lose customers – was conduct aimed at Illinois sufficient to support personal jurisdiction there. *Id.* at 1202-03. That poses no conflict with the decision below because petitioners here do not allege that Prince Turki aimed any conduct at the United States or U.S. residents.

Similarly, in *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), the Ninth Circuit held that purposeful availment can be satisfied when a "defendant has taken deliberate action toward the forum state." *Id.* at 1320 (internal quotation marks omitted). That standard was satisfied because the defendant "engaged in a scheme" to "extort[] money from" the plaintiff and, in that way, the defendant "directed his activity" toward the forum of the plaintiff's "principal place of business." *Id.* at 1322. Here, by contrast, petitioners do not allege that Prince Turki took any "deliberate action" toward the United States.[5]

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[5] Petitioners point (at 29-30) to district court decisions that, they say, conflict with the decision below. Even assuming such a conflict would warrant this Court's attention, those decisions, as the Second Circuit found, are consistent with the decision below because each defendant was a terrorist or a primary participant in a terrorist attack. *See* Pet. App. 41a-42a. That distinction matters for purposes of personal jurisdiction because

Finally, petitioners assert a conflict with *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005). As the Second Circuit explained, *Mwani* is consistent with the decision below. *See* Pet. App. 41a. In *Mwani*, the D.C. Circuit found personal jurisdiction over Osama bin Laden and al Qaeda with respect to injuries arising out of bombings of U.S. embassies abroad. Based on those facts, the D.C. Circuit held that "there is no doubt that the defendants engaged in unabashedly malignant actions *directed at* and felt in this forum." 417 F.3d at 13 (alterations and internal quotation marks omitted; emphasis added). Bin Laden's and al Qaeda's "decision to purposefully direct their terror at the United States" supported personal jurisdiction. *Id.* at 14. Here, petitioners do not allege that Prince Turki directed any conduct toward the United States.[6]

B. This Case Is an Unsuitable Vehicle To Resolve the Personal-Jurisdiction Question

Certiorari is also unwarranted because this case is a poor vehicle to resolve the issue.

First, resolution of this issue is irrelevant to the disposition of the claims against Prince Turki. Allegations that Prince Turki knowingly and intentionally donated money to charities that in turn funded al Qaeda are insufficient to satisfy *any* standard of personal jurisdiction.

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a terrorist participating in or directly aiding a terrorist attack against the United States or U.S. residents can be said to have expressly aimed conduct at the forum.

[6] The Seventh Circuit's recent decision in *Boim v. Holy Land Foundation for Relief & Development*, Nos. 05-1815 et al., 2008 WL 5071758 (7th Cir. Dec. 3, 2008) (en banc), involved defendants residing in the United States and therefore did not address issues of personal jurisdiction.

As explained previously, the only personal-capacity allegations against Prince Turki are two conclusory sentences by the *Federal Insurance* plaintiffs. Those allegations were added after the first dismissal of official-capacity claims, are contradicted by Prince Turki's sworn declaration, and remain unsubstantiated even in the face of Prince Turki's Rule 11 demand letter. *See supra* pp. 8-9.

Such conclusory allegations – even taking them to be true – are insufficient to support the exercise of personal jurisdiction. As the district court held, petitioners have failed to present any "specific facts from which [the court] could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda." Pet. App. 188a. "Conclusory allegations that [Prince Turki] donated money to charities" and that he knew those charities were funneling money to al Qaeda "do not suffice." *Id.* A refusal to credit conclusory allegations of knowing and intentional support of al Qaeda is in accord with settled precedent, *see Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998), and makes clear that petitioners' personal-capacity allegations are legally insufficient under *any* standard of personal jurisdiction. This case is accordingly an inapt vehicle to address the proper legal standard for personal jurisdiction in terrorism-related litigation.

Second, this case is an unsuitable vehicle because petitioners themselves cannot decide on the scope of the Second Circuit's decision. In their petition, petitioners assert (at 26) that the Second Circuit held that "U.S. courts cannot adjudicate claims against persons who provide material support abroad to

terrorists known to target the United States." In a filing submitted to the district less than two weeks after the petition, however, petitioners aggressively argue *against* such a "sweeping interpretation" of the Second Circuit's decision. *See* Pls.' Reply to Defs.' Supp. Br. on Second Circuit Decision at 7, *In re Terrorist Attacks on September 11, 2001*, No. 03MDL1570 (GBD) (S.D.N.Y. filed Nov. 25, 2008). Petitioners urge instead that the Second Circuit's decision be read to apply only where jurisdiction is sought on the basis of alleged "indirect[]" support for al Qaeda, while permitting petitioners to proceed against alleged "direct sponsors" of al Qaeda. *Id.* at 8-9. Indeed, petitioners' district court brief candidly acknowledges the tension between their two different readings of the Second Circuit's decision and asserts that their broader characterization in this Court is justified by their desire to secure this Court's review. *See id.* at 9 n.8. In light of petitioners' own inability to come to rest on a consistent understanding of the scope of the Second Circuit's decision, this case is a poor vehicle to revisit settled principles of personal jurisdiction.

C. The Decision Below Will Not Undermine Application of Anti-Terrorism Statutes

Petitioners claim (at 32) that the Second Circuit's decision creates "a constitutional barrier to jurisdiction in U.S. courts over those who facilitate but do not directly commit or command acts of terrorism." As explained, however, the Second Circuit merely applied long-settled precedent establishing that foreseeability of injury in a forum is insufficient to establish personal jurisdiction. *See* Pet. App. 44a. For non-primary participants in tortious conduct, the Second Circuit said, a plaintiff "must establish" that

the defendant "'expressly aimed' intentional tortious acts at residents of the United States." *Id.* (quoting *Calder*, 465 U.S. at 789).

The decision below does not "sharply limit[] the scope and enforceability" of criminal and civil anti-terrorism provisions, as petitioners contend (at 32). For one thing, the Second Circuit did not address any claims involving "'primary participants.'" Pet. App. 42a (quoting *Calder*, 465 U.S. at 790) (emphasis omitted). And, with respect to non-primary participants, the decision stands only for the limited proposition that a plaintiff must establish that a defendant aimed intentional tortious acts at the United States or U.S. residents. Petitioners suggest no reason why that standard, which tracks this Court's precedent, will undermine the effectiveness of anti-terrorism statutes.

If application of basic principles of personal jurisdiction ever did come to interfere with anti-terrorism statutes, this Court's review in future cases might be appropriate. But petitioners' scattershot, conclusory allegations against Prince Turki and other respondents are far afield from a proper enforcement of those statutes. In view of the obvious defects with petitioners' unsubstantiated and conclusory allegations – and the resulting certainty that dismissal of these respondents is the only proper outcome here – this Court's review is inappropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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